

No. 16-0311

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 13, 2017
DEBORAH S. HUNT, Clerk

In re: MAX GERBOC,

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Petitioner.

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O R D E R

Before: GUY, ROGERS, and DONALD, Circuit Judges.

Max Gerboc petitions this court for permission to appeal the district court's order granting in part Defendant Contextlogic, Inc.'s motion to dismiss for failure to state a claim. Gerboc brings this petition to preserve his right to appeal, should we decide that the district court's certification under Federal Rule of Civil Procedure 54(b) of the same order, resulting in Appeal No. 16-4734, is improvident. Contextlogic does not respond to the petition.

"In the absence of a proper certification for an interlocutory appeal under Rule 54(b), an order disposing of fewer than all claims in a civil action is not immediately appealable." *Adler v. Elk Glenn, LLC*, 758 F.3d 737, 739 (6th Cir. 2014). "Proper" certifications contain findings by the district court supporting its reasoning for certifying an immediate appeal. *See Gen. Acquisition, Inc. v. GenCorp., Inc.*, 23 F.3d 1022, 1026 (6th Cir. 1994). The district court supported its decision to certify under Rule 54(b); thus, at this juncture, we have jurisdiction over that appeal. Gerboc is also actively litigating that appeal.

Gerboc, however, is correct that a merits panel may address the propriety of a certification under Rule 54(b), *sua sponte*, following the completion of briefing. *See, e.g., EJS Props., LLC v. City of Toledo*, 689 F.3d 535, 537 (6th Cir. 2012). A decision on this petition, however, is only needed if the panel finds the certification is improper. Thus, judicial efficiency

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would be served by referring this petition to the merits panel in No. 16-4734, given that Gerboc raises the same issues in his petition as he does in that appeal. *Cf. EJS Props., LLC*, 689 F.3d at 538 (pledging to reinstate a fully-briefed appeal dismissed for an improper Rule 54(b) certification if appellant obtained proper certification within thirty days from the date that the district court filed the opinion “without further briefing or argument.”).

The petition for permission to appeal is **REFERRED** to the merits panel in Appeal No. 16-4734.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk